

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

- - -

HONORABLE VIRGINIA A. PHILLIPS, DISTRICT JUDGE PRESIDING

ALEC FISHER, )  
)  
Plaintiff, )  
)  
)  
)  
)  
vs. ) No. EDCV 12-02188-VAP  
)  
)  
)  
MONSTER BEVERAGE CORPORATION, )  
MONSTER ENERGY COMPANY, ET )  
AL., )  
)  
Defendants. )

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANTS' MOTION TO DISMISS

LOS ANGELES, CALIFORNIA

FRIDAY, JUNE 21, 2013

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OFFICIAL COURT REPORTER  
C.S.R. 12254  
UNITED STATES COURTHOUSE  
312 NORTH SPRING STREET  
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DEFENDANTS' MOTION TO DISMISS:

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1 LOS ANGELES, CALIFORNIA; FRIDAY, JUNE 21, 2013

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3 (COURT IN SESSION AT 9:47 A.M.)

4 THE CLERK: Calling item one, EDCV CV 12-02188-VAP:  
5 *Alec Fisher, et al. v. Monster Beverage Corporation, et al.*  
6 Counsel, please state your appearance.

7 MS. MEHDI: Good morning, Your Honor.  
8 Azra Mehdi for plaintiffs. With me is Melissa Wolchansky of  
9 Halunen & Associates. Ms. Wolchansky is not currently  
10 admitted. But we expect to file her pro hac vice papers; but  
11 I will be addressing the Court, Your Honor.

12 THE COURT: All right. Good morning.

13 MR. MARMALEFSKY: Good morning, Your Honor.  
14 Dan Marmalefsky and Purvi Patel on behalf of defendants.

15 MS. PATEL: Good morning.

16 THE COURT: Good morning.

17 All right. Both sides have had a chance to review  
18 the Court's tentative ruling?

19 MS. MEHDI: Yes, we have, Your Honor.

20 MR. MARMALEFSKY: Yes, Your Honor.

21 THE COURT: All right. Is there anything you wish  
22 to address in the tentative? And in particular, I know there  
23 are many issues here. So in particular, let me suggest that  
24 you probably want to address the standing issue. And it  
25 seems to me that one of the problems that I don't see how

1 leave to amend could remedy the state of the complaint, is as  
2 to the nature of the representations that are alleged -- and  
3 we went through them in detail near the end of the tentative  
4 ruling. I think each and every one of them are -- it's hard  
5 to imagine anything that could be better described as puffery  
6 than most of what you've alleged here as the basis for  
7 your -- your claims. I mean, to say that a statement that  
8 the beverage delivers a big bad buzz could contain an  
9 affirmation of facts, really boggles the mind. So -- and the  
10 same thing is true for the -- the statements that, you know,  
11 customers are going to dig these drinks; that there was a,  
12 you know, a poolside Vegas party, rehab pool party, all of  
13 those types of representations are so far from being  
14 actionable that I just -- I really question whether leave to  
15 amend is even appropriate. So I would suggest that those  
16 would be the best areas to focus upon.

17 MS. MEHDI: Thank you, Your Honor. I'll start with  
18 standing. I think the Court found that our plaintiffs, at  
19 least two of them, don't allege any physical injury which is  
20 partly the basis of the finding that there's no Article III  
21 standing --

22 THE COURT: Well, that's not precisely -- that's  
23 not really the holding that I made here. It's that their  
24 injury is conjectural.

25 MS. MEHDI: Well, Your Honor, I'm just looking at

1 the part where it says, Plaintiffs Fisher and Rucks do not  
2 allege any physical injury --

3 THE COURT: Okay. You need to slow down.

4 MS. MEHDI: -- okay -- rather they believe that the  
5 Monster drinks were safe for consumption and the -- the fact,  
6 had they known that Monster drinks could be bad for their  
7 health, they wouldn't have continued to purchase and consume.  
8 The Court found that these allegations were insufficient for  
9 Article III standing.

10 Your Honor, we -- we have in our opposition papers  
11 outlined why economic injury of the kind alleged by the  
12 plaintiffs is sufficient for purposes of Article III  
13 standing. And --

14 THE COURT: Well, what's the economic injury here?  
15 You're not claiming that they overpaid.

16 MS. MEHDI: We are claiming that they paid a  
17 premium for the drinks. And -- and because those drinks,  
18 unlike sports drinks, are -- are more expensive. And we'd be  
19 happy to -- the Court asked whether leave to amend would be  
20 appropriate. That would be one place where we could list out  
21 the prices of various drinks so that the Court may see why  
22 those drinks are more expensive than other -- than sports  
23 drinks which Monster claims that they are similar to. In  
24 fact, Monster's CEO and Rodney Sacks and president Hall have  
25 actually called Monster energy drinks the new soft drinks.

1 And so I think that we can try to demonstrate that the price  
2 differential between Monster energy drinks and the sports  
3 drinks is different and they are not the new soft drinks;  
4 that there are aspects of Monster Energy drink that are very  
5 harmful. In any event, that's what we would do.

6 The other aspect that I wanted to address -- well,  
7 let me -- you said the nature of representations, you find  
8 them really not to be misleading.

9 THE COURT: No, that's not what I stated. So  
10 that -- their classic puffery. They don't contain a  
11 statement of fact or a promise.

12 MS. MEHDI: Right. An actual puffery.

13 And plaintiffs don't agree with that  
14 characterization because, you know, you cannot look at those  
15 statements in a vacuum. You have to look at those statements  
16 in the context of advertising -- all of the advertising; not  
17 just the label on the can. And I will get to the point about  
18 the labeling in just one minute. I want to address the  
19 Court's concerns first.

20 Marketing to nine-year-olds and to 12-year olds and  
21 13-year olds and saying that you will get a big buzz, that --  
22 that is not just -- that is not inactionable puffery because  
23 it is sending a message. It's communicating the message that  
24 this is not alcohol, but it's like alcohol. Saying that  
25 Monster Energy drinks are the ideal combination of the right

1 ingredients and right proportion does -- it is actionable  
2 because it is an affirmation of fact. It's saying if you  
3 drink this, it's perfect for you. That is an affirmation of  
4 fact and that is a warranty. That's an express warranty.  
5 And so we believe that those are actionable. They're not  
6 inactionable puffery. Saying that a Monster Energy drink  
7 hydrates like a sports drink, that after a night of partying  
8 in Vegas -- Your Honor, I don't know if you've been to Vegas,  
9 but when you go to Vegas, the idea is that you drink and  
10 you -- everything is in excess, and you spend all night doing  
11 that. And then if you drink a Monster Energy drink, you're  
12 like brand new.

13 So the Court's parsing of the various  
14 representations as inactionable puffery in a vacuum, we say  
15 might do disservice to those affirmations of fact and  
16 representations that Monster Energy is putting out.

17 We'd be happy to take each one of the ones that the  
18 Court has put in its tentative, if it so chooses to issue it  
19 as its final ruling and amend the complaint to demonstrate  
20 why they're not inactionable puffery.

21 And then I wanted to address a couple of things.  
22 One is, the Court in the section on failure to allege with  
23 particularity, one of the things that the Court found was  
24 that plaintiffs' allegations of injury based on 20 different  
25 varieties when they specifically alleged only purchase of



1 eight varieties, is not specific enough. We'd be happy to  
2 put in a check mark against each variety that the plaintiffs  
3 bought, but the law doesn't require that. It requires that  
4 where products are substantially similar, that if you have  
5 bought a number of them and there's not much difference in  
6 the -- in the other products that are being consumed, that  
7 the plaintiff has standing to represent other people who have  
8 consumed those other varieties. And for that, I would  
9 advance the cases of *Ostiano v. Dreyer* and the *Jamba Juice*  
10 case.

11 And then finally, I wanted to addresses the  
12 Court's -- the finding that FDA's food label warnings do not  
13 impose the type of -- do not impose requirements for posting  
14 the type of warnings that plaintiffs are requesting.

15 Respectfully, Your Honor, the complaint alleges  
16 that the FDA hasn't done a premarket review of these dietary  
17 supplements. And, in fact, the FDA when it does focus --  
18 when it did does review under 343Q, it reviews individual  
19 ingredients. It's not a product-specific analysis. In fact,  
20 as outlined in our opposition brief, the Food, Drug and  
21 Cosmetics Act is not focused on truth or falsity of  
22 advertising claims. So the requirements of what is adequate  
23 to -- adequate warning is not really something that the FDA  
24 regulates. That's within the state's ambit and that's  
25 something that the states regulate. And I will concede that

1 we're not trying to enforce, you know, federal regulations.  
2 We are not trying to enforce the FDCA or the NLEA. We have  
3 alleged that in the totality, defendant's conduct -- it's the  
4 conduct in -- in designing a product specifically to reach to  
5 young males, designing a marketing strategy, specifically to  
6 reach to the youth. And we've attached an internal marketing  
7 document that demonstrates that Monster intends and reaches  
8 out to young kids. That is what is what is within the  
9 State's rights. That is what States regulate; not the FDA.  
10 In fact, there is so much scrutiny on them right now because  
11 the FDA hasn't done enough. So those are my arguments.

12 And I think because a number of the remaining  
13 arguments on UCL, FAL rely on its threshold rulings,  
14 Your Honor. We're happy to amend --

15 THE COURT: Well, one of the concerns I have in  
16 listening to you this morning is, it sounds like if given  
17 leave to amend, you only envision adding to the complaint.  
18 One of the other bases for my ruling is that the -- is to  
19 grant the motion on the basis that it offends Rule 8. This  
20 is probably the most prolix complaint I have ever seen and  
21 has more irrelevant, inflammatory, extraneous allegations,  
22 including allegations that some reports indicate that the  
23 claw logo ranks close behind the boogie man or Frankenstein.  
24 I mean, I don't know what those reports are. And I don't  
25 know what it means to say that a logo ranks close behind the

1 boogie man. But that doesn't -- that doesn't belong in a  
2 complaint. You say that the complaint alleges that there are  
3 some reports that the drink has been associated with high  
4 risk behavior, including everything from marijuana use,  
5 sexual risk-taking, fighting, failure to use seat belts and  
6 taking risks on a dare. This does not belong in a complaint.  
7 And that's not even the end of that list.

8 I mean, this is not -- a complaint should not be  
9 confused with a press release. If you want to do a press  
10 release, do a press release. But this is not a short-claim  
11 statement of the facts upon which you're seeking relief.

12 All right. Do you wish to respond to the arguments  
13 with respect to puffery and standing, Mr. Marmalefsky?

14 MR. MARMALEFSKY: Very briefly, Your Honor.

15 First of all, with respect to standing in the  
16 statements made by counsel right now about Rodney Sacks or  
17 Mr. Hall making various statements, I mean, there are no  
18 allegations that any of these plaintiffs heard those  
19 statements; allegations about sports drinks and whether a  
20 Monster Energy drink hydrates like a sports drink. I mean, a  
21 sports drink first of all, isn't a defined term; but again,  
22 they're talking about 28 different varieties. The phrase  
23 "hydrates like a sports drink" is not on all 28 cans. It's  
24 on a couple of cans. They're talking about marketing to  
25 9-year-olds and the evil about that; but, you know, none of

1 the plaintiffs are nine-year-olds. The plaintiffs aren't  
2 talking about any marketing specific to them. When you go to  
3 the cases that we relied on which the Court appears to have  
4 based its decision on with regard to standing, the issue is  
5 whether or not there is a cognizable actual injury. That  
6 something could be bad for someone's health is sort of the  
7 ultimate conjectural phrase. In contrast, the cases that  
8 find economic injury or where there is an affirmative  
9 representation in that representation, is false. So, for  
10 example, the *Quickset* case when someone purchases something  
11 that says "Made in the USA," and they say, I'm going to pay  
12 extra for this because it's made in the United States; I want  
13 to support American companies, there you have a statement  
14 that someone relied on to their detriment that caused an  
15 economic injury. There is no statement here that the  
16 plaintiffs have alleged or could allege that they were  
17 relying on to their detriment. There is no evidence here of  
18 paying a premium price. A person purchased an energy drink.  
19 And there's no evidence that an energy drink manufactured by  
20 Monster has one price point and an energy drink manufactured  
21 by another manufacturer has another price point.

22 I want to comment briefly on the -- what counsel  
23 said about the absence of a premarket review and the fact  
24 that the companies can decide to market their products if  
25 they've determined that they are generally recognized as

1 safe. And I agree with Your Honor when you say that any  
2 issue relating to food safety and food labeling is clearly  
3 preempted.

4 I would add to that, one of the additional  
5 preemption grounds that we had cited in which the Court  
6 references but doesn't discuss any opinion as primary  
7 jurisdiction. Food safety and food labeling is something  
8 that is sort of at the core of what the FDA does, and as  
9 counsel just deluded to, the FDA is all over the issue of  
10 caffeine and food and dietary supplements these days. They  
11 have responded to congressional inquiries by saying that, We  
12 are conducting an ongoing study of the safety of caffeine in  
13 food and dietary supplements; that we are going to ask the  
14 Institute of Medicine to conduct a workshop to evaluate  
15 whether or not there is any risk to vulnerable populations.  
16 And I recognize that the Court in its tentative has said it  
17 was unnecessary to look at the documents which we asked the  
18 Court to take judicial notice; but I would ask the Court to  
19 reconsider that because they show that, in fact, the FDA  
20 today is looking at the very issues that plaintiff is asking  
21 this Court to examine and to substitute its judgment for the  
22 judgment of the federal agency that's entrusted with  
23 responsibility for food safety and labeling. And because of  
24 the primary jurisdiction doctrine, I think the appropriate  
25 action on the motion to dismiss is not to grant leave to

1 amend to this -- at this point. The Court is never going to  
2 determine that a 140 milligrams is safe but 180 is not. I  
3 mean, those are determinations that are peculiarly within the  
4 expertise of the Food and Drug Administration.

5 Similarly, whether or not there has to be a warning  
6 beyond the warning that is on all Monster cans about not  
7 recommending consumption by children, pregnant or nursing  
8 women or those who are sensitive to caffeine, whether there  
9 should be an additional caution for people with heart  
10 conditions or something of the like. You know, that's not a  
11 determination that would normally be made by a Court. That  
12 is something that is entrusted by Congress to the FDA, and  
13 the FDA has required warnings where after its own scientific  
14 study, it is determined that warnings are appropriate. And  
15 as the FDA has said in public statements within the last  
16 year, they are evaluating whether or not, there should be any  
17 additional labeling or warnings required of any food to which  
18 caffeine is added.

19 And so I would ask the Court to consider  
20 supplementing the tentative by addressing the primary  
21 jurisdiction argument.

22 And finally, to the extent that there is going to  
23 be an amendment, the Court mentions in discussing the  
24 *Pom Wonderful* case that it only addressed preemption with  
25 respect to the Lanham Act. That is correct with regard to

1 the Ninth Circuit decision. They didn't reach the state law  
2 grounds that were articulated in the complaint because the  
3 District Court had not done so. As we point out in our  
4 briefs on remand, Judge Otero did, in fact, find that the  
5 state law claims just like the Lanham Act claim were  
6 preempted for the very same reasons that a state law cannot  
7 impose a requirement that is different from what federal law  
8 imposes. And if it's a requirement imposed by federal law,  
9 then it's preempted. So I would ask the Court to perhaps  
10 take another look at that.

11 THE COURT: All right.

12 MR. MARMALEFSKY: Thank you.

13 THE COURT: Do you wish to respond?

14 MS. MEHDI: Your Honor, I just have one additional  
15 thing to add to what I said based on counsel's argument.

16 On the standing issue, counsel mentioned that  
17 plaintiffs are not nine-year-olds. Yes, they're not  
18 nine-year-olds. Yes, they're not 9-year-olds today; but they  
19 were only 16, at least two of them were, when Monster handed  
20 out free cans without asking how old they were.

21 Also, the nine-year-old reference is not my  
22 document. It's Monster's document. They were targeting  
23 trophy kids. So the fact that all of my plaintiffs are not  
24 nine-year-old's is not the end of the inquiry, because the  
25 question really is beyond that. The question is about

1 marketing and the advertising conduct that's at issue in our  
2 complaint. And the fact that the warning on the label -- on  
3 the can has nothing addressed at youth.

4 Thank you, Your Honor.

5 THE COURT: All right. Thank you. I'll take the  
6 matter under submission. You can return your copies of the  
7 tentative to the clerk.

8 (Whereupon proceedings are adjourned.)

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C E R T I F I C A T E

ALEC FISHER :  
vs. : No. CV 12-02188-VAP  
MONSTER BEVERAGE CORPORATION, :  
MONSTER ENERGY COMPANY, ET AL.

I, MARIA BUSTILLOS, OFFICIAL COURT REPORTER, IN AND FOR THE  
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF  
CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753,  
TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND  
CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED  
PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE  
TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.  
FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE  
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/s/ \_\_\_\_\_ 08/21/2013

MARIA R. BUSTILLOS DATE  
OFFICIAL REPORTER

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